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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEON MARCELL JOHNSON, Defendant and Appellant.	B190233 (Los Angeles County Super. Ct. No. BA289589)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Champagne, Judge. Conditionally reversed and remanded.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr. and Bill Lockyer, Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Robert F. Katz, Supervising Deputy Attorneys General for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Information

Appellant Leon M. Johnson was originally charged by information dated October 3, 2005, with robbery in violation of Penal Code section 211.[1] The information further alleged the appellant had suffered two prior convictions of a serious or violent felony for purposes of section 1170.12, subdivision (a) through (d) and section 667, subdivision (b) through (i), and two prior convictions of a serious felony for purposes of section 667, subdivision (a)(1).

Competency Challenge

At a pretrial hearing on December 21, 2005, defense counsel expressed doubt as to appellant's competency to stand trial. After an unreported bench conference, the court suspended further proceedings pursuant to section 1368 and ordered a psychiatric report.[2] The minute order states that the court "declare[d] a doubt as to [appellant's] mental competence," that "[c]ounsel for the defendant submits with [sic] the court's decision," and "doctors are . . . appointed to examine [appellant] . . . and report back to this court on or before the next hearing date."

At the next hearing, on January 25, 2006, the following exchange occurred after the court called the matter: "The Court: . . . ¶ And the report, as you indicated a moment ago off the record, Ms. Bristo [defense counsel], is one that indicates that he [presumably appellant] is competent to stand trial? Ms. Bristo: Yes, your Honor. The Court : All right." The court and counsel then immediately commenced a discussion of scheduling. During this discussion, the court

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1 All statutory references herein are to the Penal Code.

2 A report was apparently obtained, but does not appear in our record.

interjected: "So criminal proceedings are resumed?" Defense counsel answered, "Yes. And there will be a not guilty, denial of all special allegations, waive reading of the information, advisement of statutory and constitutional rights." After that brief exchange, discussions about scheduling resumed. No other matters were discussed on the record and no other reference to appellant's competence or the psychiatric report appears in the reporter's transcript.

The minute order for January 25, 2006 states that the court made the following "orders and findings" at the hearing: "Said report is admitted into evidence as Court's exhibits [sic] 1 respectively, by reference to the confidential envelope in the case file. Pursuant to the stipulation of counsel, Dr. Samuel I. Miles is deemed called, sworn, qualified and having testified [sic] as to the contents of his report. The court states it has read and considered the reports of the above doctor. Both sides submit. All rest. [¶] The court finds that [appellant] is presently mentally competent to stand trial within the meaning of Penal Code section 1368 and that he is able to understand the nature of the proceedings taken against him/her and is able to assist counsel in the conduct of a defense in a rational manner. Criminal proceedings are resumed."

Amendment of Information and Waiver of Jury Trial

At a hearing on March 23, 2006, appellant agreed to allow the prosecution to amend the information to add a count of grand theft in violation of section 487 and to waive his right to a jury trial. The agreement was made with the understanding that the charge of robbery would not be before the court and that the court would be asked to find only one of the prior strikes true.[3]

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[3] Appellant also waived the appearance of a key prosecution witness -- Barbara Hart -- and agreed to allow the court to read and rely on her testimony from the preliminary hearing.

Trial

Trial took place March 24, 2006, with the court sitting as trier of fact. The evidence established that on August 31, 2005 at approximately 2:50 p.m. appellant went into a Sears store and reached into the cash drawer of cashier Barbara Hart as she was counting her cash and getting ready to close. After a brief struggle over some bills grabbed by appellant, he made off with half of a torn $100 bill. Store personnel followed him and found him hiding in some nearby bushes. They contacted the police, who arrested him shortly thereafter. The officers found the torn bill and some discarded clothing a short distance from where appellant was arrested.

Verdict and Sentencing

After hearing the evidence, the court found appellant guilty of grand theft and subsequently found true that he had suffered a prior strike.[4] The court selected the high term of three years and doubled the term due to appellant's second strike offender status, resulting in a six-year sentence.

DISCUSSION

The sole issue raised on appeal is whether the trial court erred by failing to conduct an adequate competency hearing and make a finding as to appellant's competence after both the court and defense counsel had expressed doubt about his mental acuity. We agree that the court failed to hold the requisite hearing and

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[4] After appellant was found guilty of theft, the prosecution offered a total of four years, twice the mid-term, contingent on appellant's admitting the prior. Appellant apparently rejected the offer in an off-the-record discussion.

make the requisite finding. The matter must be conditionally reversed and remanded to determine appellant's competency at the time of trial.

I

Failure to Comply with Competency Hearing Requirements

There is no dispute that trying a criminal defendant who is mentally incompetent violates the due process clause of the Fourteenth Amendment. (*Pate v. Robinson* (1966) 383 U.S. 375, 378.) This constitutional principle is embodied in section 1367, subsection (a), which provides: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

The procedure for determining a defendant's mental competence when the court or defense counsel has doubts is set forth in sections 1368 and 1369. Under section 1368, if "during the pendency of an action . . . , a doubt arises in the mind of the judge as to the mental competence of the defendant," the judge is to "state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent." (§ 1368, subd. (a).) Then, "[a]t the request of the defendant or his or her counsel or upon its own motion," the court must "recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant." (*Ibid*.) Thereafter, "[i]f counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental

competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369."[5] (*Id*., subd. (b).)

Once a court has declared doubt as to a defendant's mental competence, the court "shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant." (§ 1369, subd. (a).) With certain exceptions not applicable here, "when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." (§ 1368, subd. (c).) Failure to hold a competency hearing after the trial court states doubt as to a defendant's competency constitutes per se error, requiring reversal. (*People v. Marks* (1988) 45 Cal.3d 1335, 1340 (*Marks I*); *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 70 (*Marks II*).)

Here, defense counsel initiated proceedings by expressing doubt as to appellant's competency without any prompting from the court. The court agreed that doubt existed, halted proceedings, and ordered a psychiatric evaluation. Therefore, the court was required to complete the next step by holding a hearing and finding appellant competent before going forward.

The psychiatric report, which apparently indicated appellant was legally competent, was completed and presented to the court on January 25. The reporter's transcript does not indicate that a hearing took place on the issue of competence or that the court made the findings required by the statute. According to the transcript, the Court simply acknowledged the existence of the report and said, "All right." The only other reference to the competency proceedings

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5 If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing." (§ 1368, subd. (b).)

occurred a few moments later when the court asked of defense counsel whether "criminal proceedings [were] resumed" and defense counsel answered "Yes." The underlying facts are very similar to those in *Marks I*, where the defense counsel stated at the hearing that all section 1368 matters had been resolved because two reporting psychiatrists had stated the defendant was competent. The trial court responded by saying, "'All right,'" but made no express findings. (*Marks I, supra,* 45 Cal.3d at p. 1339.) The Supreme Court concluded that the trial court "most likely construed [counsel's comments at the hearing] as a waiver of a determination of the competency issue." (*Id*. at p. 1340.) This failure to go forward with the hearing was error because the issue of competency, "'is jurisdictional and cannot be waived.'" (*Ibid*., quoting *People v. Hale* (1988) 44 Cal.3d 531, 541.) "'Regardless of defense counsel's opinion, a hearing on the issue of defendant's mental competence must be held if the trial judge has declared a section 1368(a) doubt which has not been formally resolved.'" (*Ibid*., quoting George, L.A. Super. Ct. Crim. Trial Judges' Benchbook (Jan. 1985 ed.) p. 130, italics omitted.)

Respondent contends that any deficiency in the hearing record is remedied by a minute order stating the court found appellant "presently mentally competent to stand trial within the meaning of Penal Code section 1368 . . . ." The January 25 minute order, purporting to memorialize the proceedings of that date, states that "[p]ursuant to stipulation of counsel," the psychiatric report was "admitted into evidence as court's exhibit[] 1"; that the psychiatrist was "deemed called, sworn, qualified and having testified [sic] as to the contents of his report"; and that after "the court state[d] it ha[d] read and considered the reports of the above doctor[, b]oth sides submit[ted]." However, none of these events are recorded in the reporter's transcript, which reflects only a discussion of scheduling after defense counsel represented that the psychiatric report supported competency.

As a general rule, where there is a conflict between the reporter's transcript and the clerk's minutes, the record "'will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation].'" (*People v. Smith* (1983) 33 Cal.3d 596, 599, quoting *In re Evans* (1945) 70 Cal.App.2d 213, 216.) "'[W]hether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.'" (*Ibid*.) An appellate court will not rely on the words of a minute order where "the reporter's transcript shows the minute order does not accurately reflect the findings of the court." (*In re Jacob M*. (1987) 195 Cal.App.3d 58, 64.)[6]

Here, the minute order purported to reflect what transpired in open court, but its contents are belied by the reporter's transcript, the accuracy of which neither side disputes. While there is support for respondent's suggestion that "proceedings relating to the matter of competency ocurred . . . off-the-record," unreported proceedings cannot substitute for the requirements of a competency hearing and

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6 See, e.g., *In re Ricky H*. (1981) 30 Cal.3d 176, 191-192 (appellate court would not presume minor was guilty of a felony where minutes stated that he was so convicted, but transcript of dispositional hearing did not support that notation); *People v. Blackburn* (1968) 261 Cal.App.2d 554, 558-560 (where trial court simply stated that defendant was "guilty of Count III," appellate court would not rely on recital in "creative minute order" to the effect that defendant was guilty of robbery in the first degree and was armed at the time of the commission of the offense); compare, *In re Byron B.* (2004) 119 Cal.App.4th 1013, 1015 (where juvenile court orally stated minor must not have contact with anyone "disapproved by parent, guardian, or probation officer," inclusion of phrase "known to be" before "disapproved" in the minute order "simply clarifie[d] a point that the reporter's transcript left ambiguous" and "correctly recite[d] the juvenile court's ruling").

the necessary findings; nor can a minute order that contradicts the record of the events it purports to memorialize.[7] Reversal to correct this omission is required.

II

Proceedings After Remand

In *Marks I*, the court reversed the conviction outright and remanded for both a hearing on competency and a new trial. Subsequent decisions have concluded that this is not required in all cases. In a later proceeding, *Marks II*, *supra*, 1 Cal.4th 56, the court addressed whether failure to comply with section 1368 by holding a formal competency hearing effected a "fundamental loss of jurisdiction" or represented an act in excess of authority. (*Id*. at p. 66.) The court concluded that "the trial court does not lose subject matter jurisdiction when it fails to hold a competency hearing, but rather acts in excess of jurisdiction by depriving the defendant of a fair trial." (*Id*. at p. 70.)

In reaching its decision in *Marks II*, our Supreme Court compared the holding in *Pate v. Robinson*, *supra*, 383 U.S. 375, 387, which "emphasized the difficulty of retrospectively determining an accused's competence to stand trial . . . ," with the more recent *Drope v. Missouri* (1975) 420 U.S. 162, 182-183 (*Drope*), where the United States Supreme Court "accepted the possibility of a constitutionally adequate posttrial or even postappeal evaluation of the defendant's pretrial competence." (*Marks II*, *supra*, 1 Cal.4th at p. 67.) Based on this discussion, two recent court of appeal decisions -- *People v. Castro* (2000) 78

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[7] As appellant acknowledges, defense counsel can submit the issue of competency on the basis of psychiatric reports (*People v. McPeters* (1992) 2 Cal.4th 1148, 1168-1169), but that is not what occurred here. The court did not ask for or receive counsel's consent to decide the competency issue solely on the basis of the report, nor indicate it had read the report.

Cal.App.4th 1402 and *People v. Ary* (2004) 118 Cal.App.4th 1016 -- have held that in the appropriate situation, the trial court may decide the defendant's competence *nunc pro tunc* after remand.

In *People v. Castro*, the court relied on *Marks II* and *Drope* for the proposition that under appropriate circumstances, a *nunc pro tunc* determination would be constitutional. (78 Cal.App.4th at p. 1420.)[8] In *People v. Ary*, the court noted that the Ninth Circuit has "permitted retrospective determinations of competence to plead guilty and waive counsel, so long as 'the circumstances surrounding the case permit a fair retrospective determination of the defendant's competency at the time of trial" (118 Cal.App.4th at p. 1027, quoting *De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 986, fn. 11), and has "specifically held that a California trial court could cure its failure to hold a hearing on the defendant's competence to stand trial by conducting a retrospective hearing . . . 'when the record contains sufficient information upon which to base a reasonable psychiatric judgment.'" (118 Cal.App.4th at p. 1027, quoting *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089.)

The court in *People v. Ary* acknowledged that "meaningful retrospective competency determination" will oftentimes be impossible because "there will seldom be sufficient evidence of a defendant's mental state at the time of trial on which to base a subsequent competency determination." (*People v. Ary*, *supra*, 118 Cal.App.4th at p. 1028.) The court nevertheless concluded that in the case before it, such a determination was possible because "[d]uring pretrial hearings

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8 In the circumstances before the court, however, such a determination was not possible because the trial court had failed to obtain an evaluation by the director of the regional center for the developmentally disabled, required under the statute where the defendant has been diagnosed as developmentally disabled. (See § 1369, subd. (a).) Accordingly, there was no realistic possibility that the court would have in its record the information needed to evaluate competency as of the time of trial.

held in 1999 and 2000 on defendant's competence to waive his *Miranda* rights and the voluntariness of his confession, extensive expert testimony and evidence was proffered regarding defendant's mental retardation and his ability to function in the legal arena." (*Id.* at p. 1029.) The appellate court was unable to determine on its record whether the available evidence was sufficient to establish competence. It therefore remanded to the trial court with instructions to "determine whether the available evidence and witnesses are sufficient to permit it to reach a 'reasonable psychiatric judgment' of defendant's competence to stand trial [in 2000]." (*Ibid*., quoting *Odle v. Woodford*, *supra*, 238 F.3d at p. 1089.)

Here, as in *People v. Ary*, the record shows that evaluation of appellant's competence as of the time of trial may be undertaken after the fact because a contemporaneous psychiatric report was prepared and is available for review.[9] Accordingly, we conditionally reverse and remand for a determination whether the available evidence is sufficient to permit the court to determine appellant's mental competence in 2006. If so, the matter is resolved. If the evidence is insufficient or if it establishes that appellant lacked competence at the time, the court must hold a new competency hearing and trial.

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9 Indeed, the trial court may well have reviewed the evaluation and made the requisite finding, although as we have said, we cannot make that presumption due to the discrepancy between the minute order and the reporter's transcript.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded for a determination whether the available evidence establishes appellant's mental competence as of the time of trial in 2006. If so, the court may make such finding *nunc pro tunc* and reinstate the original judgment. If not, the court must hold a new competency hearing and trial.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.